IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 632 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT and

MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

GORDHANBHAI DANABHAI PATEL and anothers

Appearance:

MR BD DESAI, APP for Appellant

MR JV JAPEE for Respondent No. 1

MR MEHUL CHINOY for Respondent No. 2

CORAM : MR.JUSTICE H.R.SHELAT and

MR.JUSTICE J.R.VORA

Date of decision: 10/01/2000

ORAL JUDGEMENT : [Per: H.R. Shelat, J.]

1. The respondents (original accused) were placed on trial in connection with the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code before the Court of the Sessions Judge, Sabarkantha at Himatnagar in Session Case No. 1 of 1990. They came to be acquitted on 10th April, 1992. Feeling aggrieved by the order of acquittal, the prosecution has preferred this Appeal.

2. Necessary facts may in brief be stated. Manibhai Kuberbhai, serving as teacher in the school at Kadoli in Himatnagar taluka, was residing with his family members. Jayaben the victim, aged about 15 years is his daughter. Jayaben had joined the school called Aadarsh Vidyavihar, Kadoli, where Manibhai was serving. At the relevant time, she was studying in Standard - IX. On 11th March, 1989, being Saturday, tuition hours were in the morning. Jayaben left her house for going to the school, but she did not attend the prayer. Her father could note her absence. After the prayer he went into the classroom of Jayaben. He did not find his daughter Jayaben, but her books were found lying on the bench. On enquiry he knew that Jayaben had gone to Prempur, and therefrom she had gone to Ahmedabad via Idar. From the books of Jayaben, address of Respondent No.1 was found. The father of Jayaben therefore had a reason to doubt that his daughter Jayaben must have eloped with respondent No.1. A complaint was then lodged with Himatnagar Town Police Station. During the investigation Jayaben was found from the place of Jeghanhirkhan Mahebudkhan Pathan. She was sent to the hospital for examination. On the strength of the materials collected by the police, both the respondents, found to be the mashers, came to be arrested. It was found during the investigation that respondent No.1 had written seductive letters and deluded Jayaben by cajolery, giving false promises to leave her father's place. He led her by the nose and caused to entertain very high hopes so as to satisfy his carnal desire. Immature, Jayaben did not realise cupboard love and snare, and started to consort with respondent No.1 who had succeeded in infatuating her. Taking the disadvantage of intimacy and consociation developed and helpless resignation respondent No.1 more than once without her consent and desire defiled Jayaben by copulating. Not only that but he also by ruse caused Jayaben to surrender respondent No.2, who had also committed the same wrongs respondent No.1 had done. At the conclusion of the investigation, a charge sheet against both, for the above mentioned offences cannot be filed in the court of Chief Judicial Magistrate, at

Himatnagar. The learned Chief Judicial Magistrate was not competent to hear and decide the case relating to the aforesaid offences. He, therefore, committed the same to the Court of Sessions, which came to be registered as Session Case No. 1 of 1990. The then learned Sessions Judge then framed the charge, to which, both the respondents pleaded not guilty. The prosecution led necessary evidence. Appreciating the evidence before him, the then learned Sessions Judge held that the prosecution failed to establish the charge levelled against the respondents. He therefore acquitted both the respondents. It is against this order of acquittal, the present Appeal has come up before us.

3. Mr. B.D. Desai, learned APP, taking us through the entire evidence as well as the judgment rendered by the learned Sessions Judge, contends that the learned Sessions Judge has fallen into error in not appreciating the evidence of Jayaben in its proper perspective. Had he appreciated rightly, the conclusion would have been otherwise. There was no reason to disbelieve the statements made by Jayaben, but, the learned Sessions Judge assigning illogical reasons discarded her evidence. In fact there is no evidence on record to conclude that Jayaben was not telling the truth. He further contends that in such cases corroborative evidence can hardly be expected. The court has to as far as possible accept the testimony of the victim rather than finding fault with the same as has been done by the learned Sessions Judge. The court cannot ignore the hard realities, and must not be obsessed with technicalities, impracticablities and improvidence.

4. This is the acquittal appeal. We cannot therefore interfere with the decision by the lower court lightly. If there is the error of law or it is found that the conclusions drawn and appreciation of evidence made are arbitrary or perverse or wholly in disregard of sound principles of law this court can upset the order of acquittal, but this court cannot on the ground that out of two reasonably possible views on facts, the view this court is inclined to take is better than the view taken by the trial court. Like wise view is taken by the Supreme Court in the case of Bharwad Jakshibhai Nagajibhai vs. State of Gujarat, 1996 (1) Guj L.H. 226 holding that though the principle is that the appellate court does not disturb the order of acquittal in a case where two views are reasonably possible, but where the approach of the trial court is manifestly erroneous and conclusions drawn are wholly unreasonable and perverse, the above principle is not applicable, and court of

appeal can interfere.

5. Bearing such law in mind, we will proceed to examine the points that arise for consideration. In such case, the age of the victim assumes importance. It is hence necessary first to know what the age of Jayaben was on the date of incident. From the evidence of Manibhai, father of victim - Jayaben (Exh. 24) it is clear that Jayaben's birth date is 1st December, 1973. The birth certificate issued by the Local Body is not produced, but extract from the school record is produced at Exh.31. When the best available evidence from the local body is not available, the entry made in the school register, can be relied upon, provided the guardian who had gone to the school for admission of his ward, and who made the statement about the birth date, is examined in support of that certificate. Manilal, who is the teacher and guardian of the victim Jayaben has stated that he had gone to the school for getting Jayaben admitted in the school. He mentioned there that the birth date of Jayaben was 1st December, 1973. There is no reason to discard such evidence. The school entry is thus duly proved. The same was therefore rightly relied upon by the learned Sessions Judge. According to that entry also, the birth date of victim Jayaben is 1st December, 1973. The incident happened on 11th March, 1989 and thereafter for few days till Jayaben could be traced out, the wrong i.e. copulation continued. It therefore follows that on the date of offence, namely, 11th March, 1989, Jayaben - the victim was 15 years 3 months and 11 days old. She was in any case certainly below 16 years of age.

6. Having found that on the day of incident, Jayaben was below 16 years of age, we now proceed to examine the evidence firstly in order to determine whether the prosecution has succeeded in establishing the charge relating to the offence punishable under Sections 363 I.P. Code. Bearing in mind the age of the victim, we shall confine to the relevant portion of the section. The offence of kidnapping is complete if the accused takes or entices any minor under 16 years of age if a male , or age 18 years of age if a female, from the custody of the guardian of such minor and without the consent of the guardian. Consent or unwillingness of minor is not material. One may therefore jump to the conclusion that in this case kidnapping can be said to have been established as Jayaben was aged below 18 years, on the day of incident. But, reading Section 361 of the Indian Penal Code, what becomes clear is that if there is no enticement from the accused and has played no role in

taking the minor away from the custody of his/her guardian, and the minor has of his/her own accord left the place of his/her guardian and has gone to the accused, the offence of kidnapping cannot be said to have been constituted.

7. It is the case of the prosecution that respondent No.1 used to meet the victim often in past and also used to write letters to the victim. In the last two letters the respondent No.1 wrote to the victim few days prior to 11th March, 1989, the day on which the victim Jayaben left her place directly from the school, as alleged the respondent No.1 had, giving high hopes creating a rosy picture of the future stating that he would maintain her to the best of his abilities and exhausting every resource, and promised that he would make her life resplendent, restful, and very happy; and she would always feel satiated, allured the victim to leave Kadoli and run down to Ahmedabad, as a result of which she left; and going to Ahmedabad became the prey and made her life lugubrious, because respondent No.1 was the roue and scamp.

8. It is not necessary that the person interesting to kidnap must be present at the place from where the victim is enticed or taken away so as to artfully make the victim ready to go with him. The victim can be made ready to leave her/his place resorting to different devices remaining away, and one of such devices is to write letters. In this case, the enticement was according to the prosecution by writing letters. When such is the case of the prosecution it was incumbent upon it to produce those letters, if not impossible. It is pertinent to note that the prosecution has, for the reasons best known to it, abstained from producing those two letters. It is not the case of the prosecution that those two letters were not available at all or were suppressed from the investigating agencies or were destroyed. Jayaben is examined at Exh.19. No explanation is sought from her for not producing those two letters. It can be said that the letters were available but for the reasons not stated, the same are withheld. When that is so, the court is entitled to infer everything against the prosecution. In view of the fact the learned Sessions Judge is perfectly right in drawing the inference against the prosecution and holding that in fact there was neither enticement nor allurement from respondent No.1, and so far as kidnapping is concerned, the respondents have played no role whatsoever. At this stage, two of the letters written by the victim to the respondent No.1 cannot be ignored.

They are produced at Exhibits 60 and 61. The letter at Exhibit 60 is dated 19th January,1989 and it appears that another is not dated. From those letters it can be said that Jayaben used to address respondent No.1 as "savan" and respondent No.1 used to address her as "sapana." The victim has made it clear in her letter to respondent No.1 that she was in neck-deep love with him and would like to meet him often, making it further clear that she cannot tolerate loneliness. Once, during the Shivratri day, respondent No.1 had been to Kadoli, but had not seen the victim. The victim has also therefore referred that incident just to give a hint that she was on the contrary dreaming of meeting him but could not for the reason known to him very well. She without being specific and expressing clearly gave an inkling about her planning. What can be said from these two letters is that she in fact was struggling to meet respondent No.1 and stay with him. She was without the company of respondent No.1 feeling like a fish out of water. She, therefore, decided to leave of her own accord and went to Ahmedabad to meet respondent No.1, where she stayed for few days with him and at the instance of respondent No.1, for rest of the few days with respondent No.2. What can be deduced from such facts is that Jayaben was having affairs with the respondent No.1 and both used to meet. During his last visit to Kadoli on Shivratri day respondent No.1 did not see her, who was longing for the tete-a-tete since long. Jayaben therefore lost per patience. She becoming impassioned and impatient left her place of her own accord and went to Ahmedabad. It cannot, therefore be said that the respondents are guilty of the offence of kidnapping punishable under Section 363. Consequently and for the following reasons the charge of the offence u/s 366 also fails. The learned Sessions Judge is, therefore, perfectly right in holding that the prosecution has failed to establish the charge of kidnapping against the respondents.

9. We will now switch over to another charge of rape. When the evidence on record is perused, it clearly appears that the prosecution has also failed to establish the said charge. Of course, in such cases, the evidence of the victim cannot lightly be brushed aside and due weight must be given to that evidence without insisting for corroborative evidence, provided of course the evidence of the victim suffers from no serious infirmity, and is appealing too. On perusal, the evidence of the victim is found doubtful and not reliable unflinchingly. It would therefore be prudent to insist for cogent corroboration. After the victim was found out on 17th March, 1989, she was taken to Dr.Manish A. Suvera, on

18th March, 1989, for medical examination. Before we proceed, it may be mentioned that according to the victim Jayaben after she met respondent No.1 at Ahmedabad, she was compelled to have coition against her will and desire and had to show helpless resignation. On every day in succession the respondent No.1 forced her to have intercourse, and exercising force he succeeded. Later on respondent No.2 raped her against her will or desire in the same way till 17th March 1989 when she could be traced. If that was so the doctor on 18th March, 1989 could have certainly found the sign of commission of rape. He on the contrary found that there was no sing of recent sexual intercourse. He also found that Hymen was having old healed tare, and vaginal passage was admitting two fingers. This shows that the victim Jayaben was habitual for sexual intercourse and was not leading a moral life. When that is so, prudence dictates that cogent corroboration must be insisted upon. It may be stated that the Doctor does not support commission of rape as he found no mark or sign of rape. There is no evidence supporting the victim. The learned Session Judge was, therefore, perfectly right in holding that the victim Jayaben, who was in love with respondent No.1 and was keen to meet the respondent No.1, of her own accord went to Ahmedabad, and came out with cross cutting statements when her affairs and immorality could be known to the society. She therefore came out with face saving explanation and case not worthy of credence. On query, Mr. B.D.Desai, learned APP has failed to satisfy us pointing out anything from the record indicating about the establishment of the charge. We have perused the evidence on record with meticulous care and also the judgment rendered by the learned Sessions Judge. We generally agree with the reasoning of the learned Sessions Judge and the conclusion drawn. When that is so, in view of the the decision of the Apex Court in the case of Girijanandini Devi vs. Bijendra Narain Chowdhari, AIR 1967 SC 1124, not necessary for us to restate all those reasons of the learned Sessions Judge. Suffice it to say that when we entirely agree with the appreciation of the evidence made by the learned Sessions Judge, and the conclusions he has drawn, and for the aforesaid reasons we see no justification to interfere with the order of acquittal.

10. Thus for what we have said above, this Criminal Appeal being devoid of merits, fails and is hereby dismissed maintaining the order of acquittal passed by the lower court.

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